Supreme Court, U.S.
FILED

170 (1)

No. 10-725 NOV 23 2010

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In The
SUPREME COURT OF THE UNITED STATES

WILLIAM L. HARDY, M.D.,
*Petitioner,*

v.

STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS*

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment Due Process Clause's requirements of notice and hearing in a meaningful time and manner allow for enforcement of settlement agreements and representations of the State in administrative proceedings concerning a medical license.

2. Whether the substantive due process protection against arbitrary State action prevents a State from twice breaching agreements with a physician regarding attempts to restrict his medical license, a property and liberty right protected under the Fourteenth Amendment's Due Process Clause.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... iii

TABLE OF CITED AUTHORITIES ..... v

OPINIONS BELOW ..... viii

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 8

I. **The Opinions of the Appellate and Chancery Courts Below Conflict with Relevant Decisions of this Court on the Opportunity to Be Heard at a Meaningful Time and Meaningful Manner Requirements of Procedural Due Process** ..... 8

*A. A medical license is a protected property and liberty interest* ..... 8

*B. Procedural due process contemplates notice and the opportunity to be heard at a meaningful time and in a meaningful manner* ..... 9

*C. This Court's decision in Santobello requires enforcement of agreements by a State when it seeks to deprive protected property or liberty interests* ..... 12

**II. The Opinions of the Appellate and Chancery Courts Below Conflict with Relevant Decisions of this Court on the Substantive Due Process Protection Against Arbitrary State Action** ..... 15

**III. Review Should Be Granted In Order to Clarify that Due Process Requires Enforcement of Agreements by a State When it Seeks to Deprive Protected Property or Liberty Interests, Irrespective of Whether the Proceeding is Criminal or Administrative** ..... 19

CONCLUSION ..... 21

APPENDIX ..... App. 1

Revised Order of the Administrative Judge for the Tennessee Department of Health (May 23, 2007) ..... App. 3

Order Denying Petition to Reconsider by Administrative Judge for the Tennessee Department of Health (Aug. 27, 2007) ..... App. 7

Memorandum and Order of Chancery
Court of Davidson County,
Tennessee (Feb. 27, 2009).....App. 10

*Hardy v. State Dept. of Health, Div. of Health Related Boards*,
No. M200900619COAR3CV,
2010 WL 175107
(Tenn. Ct. App. Jan. 19, 2010).....App. 28

Order of the Tennessee Supreme Court
(Aug. 25, 2010) .....App. 45

## TABLE OF CITED AUTHORITIES

**Cases:**

*Barry v. Barchi*, 443 U.S. 55 (1979) ..... 9

*Bd. of Curators v. Horowitz*,
435 U.S. 78 (1978) ..... 8, 10

*Bd. Of Med. Exam'rs v. Friendman*,
263 S.W.74 (Tenn. 1924) ..... 9

*Bordenkircher v. Hayes*, 434 U.S. 357(1978) ..... 20

*Collins v. Harker Heights*, 503 U.S. 115 (1992) .... 16

*County of Sacramento v. Lewis*,
523 U.S. 833(1998) ..... 16

*Daniels v. Willaims*, 474 U.S. 327 (1986) ..... 15

*Greene v. McElroy*, 360 U.S. 474 (1959) ..... 8

*Goldberg v. Kelly*, 397 U.S. 254 (1970) ..... 10

*Hardy v. State Dept. of Health,*
*Div. of Health Related Boards,*
No. M200900619COAR3CV,
2010 WL 175107
(Tenn. Ct. App. Jan. 19, 2010) ..... 19

*Joint Anti-Fascist Refugee Committee v.*
*McGrath*, 341 U.S. 123 (1951) ..... 18, 19

*Logan v. Zimmerman Brush Co.*,
455 U.S. 422 (1982) ..... 15

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... 10, 11, 12, 19

*Meyer v. Nebraska*, 262 U.S. 390 (1923) ..... 9

*Rochin v. California*, 342 U.S. 165 (1952) ..... 16

*Santobello v. New York*,
404 U.S. 257 (1971) ..... 12-14, 20

*Schware v. Bd. of Bar Exam. of State of N.M.*,
353 U.S. 232 (1957) ..... 9, 16-18

*Town of Castle Rock, Colo. v. Gonzales*,
545 U.S. 748 (2005) ..... 9

*United States v. Salerno*, 481 U.S. 739 (1987) ..... 16

*Washington v. Glucksberg*,
521 U.S. 702 (1997) ..... 15

*Whitney v. California*, 274 U.S. 357 (1927) ..... 15

*Wieman v. Updegraff*, 344 U.S. 183 (1952) ..... 18

*Zinermon v. Burch*, 494 U.S. 113 (1990) ..... 15

**Constitutional and Statutory Provisions:**

U.S. CONST. AMEND. XIV ..... 1, 8

28 U.S.C. § 1257(a)..... 1

Tenn. Code Ann. § 4-5-322..... 5

**Other Authorities:**

Sup. Ct. R. 10 ..... 8

## CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Tennessee Court of Appeals (App. 27-43) is unreported but available electronically at *Hardy v. State Dept. of Health, Div. of Health Related Boards*, No. M200900619COAR3CV, 2010 WL 175107, at *1 (Tenn. Ct. App. Jan. 19, 2010), perm. app. denied (Aug. 25, 2010).

The memorandum opinion and order of the Chancery Court for Davidson County, Tennessee (App. 9-26) and the revised order of the administrative law judge in proceedings before the Tennessee Board of Medical Examiners (App. 2-5) are unreported but included in the appendix.

## PETITION FOR WRIT OF CERTIORARI

Petitioner, William Laurence Hardy, M.D., respectfully prays that a writ of certiorari issue to review the opinion of the Tennessee Court of Appeals.

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## STATEMENT OF JURISDICTION

The Tennessee Court of Appeals issued an opinion denying Petitioner's claims on January 19, 2010. Petitioner timely sought discretionary review by the Tennessee Supreme Court, but Petitioner's application for permission to appeal the judgment of the Tennessee Court of Appeals was denied on August 25, 2010. (App. 44). Petitioner seeks review of a final judgment rendered by the highest court of a State in which a decision could be had on Petitioner's Fourteenth Amendment due process claim. *See* 28 U.S.C. § 1257(a).

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## CONSTITUTIONAL PROVISIONS

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which reads in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. AMEND. XIV.

## STATEMENT OF THE CASE

This case involves whether State actors in administrative proceedings seeking to restrict a medical license may make and break agreements without recourse. Absent guidance from this Court, lower courts will continue to misconstrue the Fourteenth Amendment's Due Process Clause in the administrative context to provide only the barest procedural protections of notice and hearing.

Dr. William Hardy is a licensed medical doctor and U.S. Navy veteran who has been practicing for over thirty years, many of those years as a military physician and now in private practice. (Record 118-19).[1] In 2004, an investigation into allegations made about Dr. Hardy's conduct with two of his patients was conducted by the Tennessee Department of Health, Office of Investigations. (Record 263). At the conclusion of the investigation, as memorialized in a 2005 letter written by Dr. Hardy's counsel that is uncontroverted in the record, the Deputy General Counsel for the Tennessee Department of Health, with approval and authority from the Medical Director, and counsel for Dr. Hardy agreed in 2004 that administrative action would not be brought against Dr. Hardy's license and that Dr.

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[1] Citations to the record are to the appellate record from the Tennessee Court of Appeals.

Hardy would attend a prescribing course. (Record 430-31).

In 2005, a change in personnel occurred within the Tennessee Department of Health, Office of General Counsel. As a result, both a new Assistant General Counsel and Deputy General Counsel became involved in Dr. Hardy's matter. (Record 463, 345). The Assistant General Counsel sent a letter to Dr. Hardy informing him that the Department intended to bring administrative action against his license. (Record 461-63). Dr. Hardy's counsel sent a letter to the Office of General Counsel reminding that office of the agreement reached the prior year concerning Dr. Hardy and articulated the unfairness of re-raising the issues that had already been resolved. (Record 345). No response was made to the letter and no action was brought, at that time, against Dr. Hardy's license.

In December 2005, more personnel changes occurred and yet another attorney in the General Counsel's Office was assigned Dr. Hardy's matter. (Record 360). In April 2006, that attorney filed a Notice of Charges commencing administrative action seeking to restrict Dr. Hardy's medical license. (Record 363); (App. 11).

In May 2006, settlement negotiations between counsel for the parties resulted in a second agreement, and Dr. Hardy's counsel sent a letter memorializing the second agreement. (Record 453). After the agreement was reached, an Agreed Order

was drafted and placed in the file of the Office of General Counsel. (Record 410). Additionally, counsel for both parties informed the Administrative Law Judge at a prehearing conference that the case had been resolved. (App. 3).

The attorney with whom the second agreement was reached was terminated from the Office of General Counsel in June 2006. (Record 413). That same month, another Assistant General Counsel entered an appearance in the case, and in July 2006, the Office of the General Counsel maintained that the matter had not been settled. (Record 465).

After the breach of two agreements by the Department of Health, Office of General Counsel, Dr. Hardy filed a motion to dismiss administrative proceedings and for specific performance of the first agreement with the Administrative Law Judge. *See* (App. 12-13); *see also* (Record 500-12). The motion articulated that the State's conduct in breaching two agreements violated Dr. Hardy's right to due process under the Fourteenth Amendment to the U.S. constitution. *See* (Record 500).

Ruling on Dr. Hardy's motion to dismiss, the Administrative Law Judge denied the motion but found the existence of two agreements, determined that the first agreement could not be reconstituted due in part to loss of documentation by the State, yet ruled that the second agreement could be reconstituted, had been breached, and due process

required its specific performance. (App. 3-7). The ruling declared that "Due Process requires specific performance of the second agreement reached by the parties." (App. 5).

Disagreeing that the first agreement could not be reconstituted and enforced, and therefore due process required dismissal of the administrative action, Dr. Hardy sought interlocutory appeal to the Chancery Court for Davidson County, Tennessee, pursuant to Tenn. Code Ann. § 4-5-322(a)(1) and the Uniform Administrative Procedures Act. (App. 31).

In the Davidson County Chancery Court on interlocutory appeal, the chancellor noted that an agency's findings are entitled to considerable deference, but concluded that neither agreement was binding. (App. 24). "This is an appeal of a civil administrative proceedings regarding professional licensure, and there is no companion criminal case. As such, Dr. Hardy's reliance on criminal constitutional jurisprudence for the standard of what constitutes an enforceable agreement or an enforceable settlement in this civil context is misplaced. Even though the courts may borrow from criminal jurisprudence, this appeal is governed by civil legal standards." (App. 20) (internal citations omitted).

> In other contexts, it is clear that the State cannot be bound to a proposed settlement agreement or a contract based on letters from opposing counsel,

> unsigned memoranda or orders, oral promises, or the recommendation of counsel for the State. . . . The public interest should not necessarily be eclipsed by concerns about promises that may have been made by former counsel for the State when current counsel for the State and current officials, who are presumed to be operating in good faith and in the public interest, decide to use their independent professional judgment to handle an administrative proceeding in a fashion that might differ from prior indications.

(App. 22-23). The chancellor then denied "Dr. Hardy's due process claim" because "no enforceable agreement or settlement was ever reached by the parties." (App. 24). Finding that due process in the administrative context just provided for notice and a hearing, the court concluded that Petitioner had "an opportunity for due process in the contested case proceeding." (App. 24).

Appealing the decision of the Chancery Court, Dr. Hardy raised the due process issue with the Tennessee Court of Appeals. The State appellate court recognized that Petitioner's appeal from the Chancery Court's opinion "contend[ed] that the parties have entered into two separate agreements and that due process requires this action be dismissed." (App. 29). Rather than address the issues briefed by the parties, the appellate court affirmed

the Chancery Court's opinion based on an interpretation of the record that converted Petitioner's motion to dismiss into a motion for summary judgment. (App. 37).

In the interest of "judicial economy," the state appellate court addressed the issue of due process and concluded that "[a] person's liberty or property interest cannot be taken away without due process," that, "[g]enerally, due process requires notice and opportunity to be heard," that "Dr. Hardy has not alleged that he was not provided either sufficient notice of the charges against him, or an opportunity to be heard," and that "[a]ccordingly, we do not find that due process requires dismissal of the action." (App. 42-43).

The Tennessee Supreme Court denied Dr. Hardy's application for permission to appeal the issue of whether the State's conduct violated his right to due process. (App. 45).

## REASONS FOR GRANTING THE WRIT

The Tennessee Court of Appeals' and Davidson County Chancery Court's decisions conflict with relevant decisions of this Court and present an opportunity to directly settle an issue that has not been specifically, but should be, addressed. Sup. Ct. R. 10(c).

### I. The Opinions of the Appellate and Chancery Courts Below Conflict with Relevant Decisions of this Court on the Opportunity to Be Heard at a Meaningful Time and Meaningful Manner Requirements of Procedural Due Process.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects individuals from state action that would deprive them of property or liberty interests without due process of law. *See* U.S. CONST. AMEND. XIV.

#### *A. A medical license is a protected property and liberty interest.*

A State's actions are subject to review under the Due Process Clause when they affect a qualifying liberty or property interest. *Bd. of Curators v. Horowitz*, 435 U.S. 78, 82 (1978). The right to engage in a chosen profession without unreasonable governmental interference or deprivation is both a liberty and property interest. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specif-

ic private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Similarly, a professional license issued by a State, which can be suspended or revoked only upon a showing of cause, is a protected property interest under the Constitution. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 772 (2005); *Barry v. Barchi*, 443 U.S. 55, 64 n.11 (1979); *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); *see also Bd. Of Med. Exam'rs v. Friendman*, 263 S.W.74, 79 (Tenn. 1924) (recognizing that a license to practice medicine is a protected property right).

### *B. Procedural due process contemplates notice and the opportunity to be heard at a meaningful time and in a meaningful manner.*

A State seeking to deprive someone of a liberty or property interest must, at minimum, provide sufficient notice and an opportunity to be heard at a meaningful time and a meaningful manner, consistent with procedural due process

requirements. *See Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978). When a liberty or property interest is at issue, a court must determine whether there has been sufficient notice and the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976). This Court in *Mathews* articulated the test for determining the requirements of procedural due process:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg v. Kelly, supra*, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

*Mathews*, 424 U.S. at 333-35.

Such an analysis of procedural due process

was not conducted by the State court below, but rather the only focus was on a mechanical view of notice and hearing. In the context of multiple breached agreements by the State in proceedings where it seeks to deprive protected liberty and property interests, more than a mere mechanical look to whether notice and hearing were provided is required; rather:

> "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

*Mathews*, 424 U.S. at 333.

The chancery and appellate courts below wholly failed to address the risk of an erroneous deprivation given the procedures used and the value of additional safeguards beyond bare notice and hearing. *See Mathews*, 424 U.S. at 335. Just providing Dr. Hardy with notice of the attempted deprivation and an opportunity for a hearing on the merits does not resolve the procedural implications of State misconduct *in between* the notice and any hearing. Clearly, holding State actors accountable for their agreements and representations is an additional reasonable safeguard that takes into consideration the substantial private interest in the medical license as well as the State's interest, particularly given the little additional

administrative burden, if any, in enforcing such agreements. *Id.* In fact, this case exemplifies the inefficiency, with respect to meaningful time and manner of process, entailed when State actors are not held accountable for breaches of agreements in administrative proceedings. The "procedural protections" "demand[ed]" by due process in this "situation", *Id.* at 333, require enforcement of the State's breached agreement and dismissal of the administrative proceedings.

### C. *This Court's decision in Santobello requires enforcement of agreements by a State when it seeks to deprive protected property or liberty interests.*

The decision by the Tennessee Court of Appeals allowing States to disavow agreements in administrative proceedings is contrary to this Court's authority. This Court has held that an agreement made by a State actor is binding as a matter of due process, regardless of personnel changes. In *Santobello v. New York*, the Court addressed "whether the State's failure to keep a commitment concerning the sentence recommendation on a guilty plea required a new trial." 404 U.S. 257, 258 (1971). In that case, after negotiations, the Assistant District Attorney assigned to the case agreed to permit the defendant to plead guilty to a lesser-included offense and to make no recommendation as to the sentence. *Id.* Before the defendant was sentenced, he acquired

new defense counsel, the judge who had accepted his plea had retired, and another prosecutor had replaced the prosecutor who had negotiated the plea. *Id.* at 258-59. When the new prosecutor recommended the maximum sentence, new defense counsel objected. *Id.* at 259. "The second prosecutor, apparently ignorant of his colleague's commitment, argued that there was nothing in the record to support petitioner's claim of a promise," *id.*, and the sentencing judge, before imposing the maximum sentence based on the defendant's criminal history, stated that his decision was not influenced by the District Attorney's recommendation. *Id.*

This Court in *Santobello* noted that the record "represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." *Id.* at 260. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262.

Ultimately, the *Santobello* Court decided it need not determine whether the judge would have been influenced had he known all of details about the plea negotiations, but remanded the case for

further consideration of appropriate relief (i.e., specific performance of the plea or the opportunity to withdraw the plea) in "the interests of justice and appropriate recognition of the duties of the prosecution in relation to the promises made in the negotiation of pleas of guilty." *Id.* at 262-63. In a concurring opinion, Justice Douglas emphasized that the State "did not keep its 'plea bargain' with petitioner and that it is no excuse for the default merely because a member of the prosecutor's staff who was not a party to the 'plea bargain' was in charge of the case when it came before the [court]." *Id.* at 263 (Douglas, J., concurring). Therefore, *Santobello* stands for the proposition that when a State seeks to deprive someone of an interest protected by due process, if the State makes an agreement within its apparent authority and the individual relies upon it in good faith, the State will be held to abide by its terms.

According to this Court's decisions, personnel changes like those at the Office of General Counsel should not have left Petitioner in the situation of repeatedly having to defend against charges resurrected in breach of a previously-negotiated resolution. Certiorari should be granted to correct the misimpression advanced in the State appellate court's opinion that bare notice and an opportunity to be heard are the only protections afforded to interests protected under the Due Process Clause in administrative proceedings.

## II. The Opinions of the Appellate and Chancery Courts Below Conflict with Relevant Decisions of this Court on the Substantive Due Process Protection Against Arbitrary State Action.

Due process is not only about procedure, and the opinion of the Tennessee Court of Appeals and the decision of the Chancery Court do not acknowledge that the Clause has a substantive component "that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)). *See also Whitney v. California*, 274 U.S. 357, 373 (1927); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (reversing an entitlement decision that constituted an arbitrary state action because the state's established procedure denied a state-created entitlement in a random manner).

Contrary to the holdings of the Tennessee Court of Appeals and the Davidson County Chancery Court, due process contains a substantive component such that the Fourteenth Amendment's due process protection consists of more than just "notice and an opportunity to be heard." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.").

Governmental action that is "arbitrary", "shocks the conscious", or interferes with rights "implicit in the concept of ordered liberty" violates substantive due process protections under the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (citing *Rochin v. California*, 342 U.S. 165 (1952) (shocks the conscious); *Collins v. Harker Heights*, 503 U.S. 115 (1992) (arbitrariness); *United States v. Salerno*, 481 U.S. 739 (1987) (rights implicit in concept of ordered liberty)).

This Court addressed application of due process beyond procedural process in the context of professional licensure in *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (1957) (unanimous decision). In *Schware*, the petitioner sought to sit for the New Mexico bar examination, but was denied the opportunity because of the Board of Examiners' determination that the petitioner lacked the requirement of "good moral character." *Schware*, 353 U.S. at 233-35. When the petitioner was not allowed to sit for the bar examination, he requested and was provided with a full hearing on the merits. At the hearing, the evidence showed the basis for denial to sit for the bar examination was the petitioner's prior membership in the Young Communist League when he was 18 years old, the use of names other than his Jewish name earlier in his life in an effort to avoid discrimination in finding employment during the Great Depression, his involvement in labor and other protests during the

Depression that led to multiple arrests but no convictions, and his indictment in 1940 for violating the Neutrality Act of 1917 "to induce men to volunteer for duty on the side of the Loyalist Government in the Spanish Civil War." *Schware*, 353 U.S. at 237. Before his federal case went to trial, it was dismissed and he was released, and in 1940 he quit the Communist Party. *Id.* In 1944, he entered the U.S. Armed Forces, fought in World War II as a paratrooper in New Guinea, and was honorably discharged in 1946. *Id.* The New Mexico Supreme Court placed heavy emphasis on the petitioner's membership in the Communist Party in determining he did not meet the moral fitness requirement to sit for the bar exam. *Id.* at 233-34.

Justice Black, writing for the Court in *Schware*, found the State's action to be constitutionally arbitrary and violative of due process. *Id.* at 245-46.

> During the depression Schware was led to believe that drastic changes needed to be made in the existing economic system. There is nothing in the record, however, which indicates that he ever engaged in any actions to overthrow the Government of the United States or of any State by force or violence, or that he even advocated such actions. Assuming that some members of the Communist Party during the period from 1932 to 1940 had

> illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. As this Court declared in *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216: 'Indiscriminate classification of innocent with knowing activity **must fall as an assertion of arbitrary power.**' *Cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 136, 71 S.Ct. 624, 630, 95 L.Ed. 817. And finally, there is no suggestion that Schware was affiliated with the Communist Party after 1940-more than 15 years ago. We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character.

*Schware,* 353 U.S. at 245-46 (emphasis added).

In this case, by finding that Dr. Hardy "has been afforded due process by being given proper notice of the charges and an opportunity to be heard," the State court's opinion conflicts with this Court's holdings which provide that the adequacy of a procedural protection is a separate consideration from whether the substantive interests protected under the Due Process Clause have been subverted by state action, as was the

situation in *Schware*. In finding that due process only provides the barest form of notice and hearing, the opinions of the appellate and chancery courts below conflict with relevant decisions of this Court on the substantive due process protection against arbitrary state action.

## III. Review Should Be Granted In Order to Clarify that Due Process Requires Enforcement of Agreements by a State When it Seeks to Deprive Protected Property or Liberty Interests, Irrespective of Whether the Proceeding is Criminal or Administrative.

Even though this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976), reveals the general lack of distinction of due process in criminal and administrative matters, *Mathews* at 333 ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'") (citing and quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), the State courts below found that constitutional due process decisions from this Court and lower courts in criminal cases concerning breached agreements by State actors were inapplicable in the administrative context. *See* Davidson County Chancery Court Memorandum and Order, para. 5 (App. 22); *Hardy v. State Dept. of Health, Div. of*

*Health Related Boards*, No.M200900619COAR3CV, 2010 WL 175107 (Tenn. Ct. App. Jan. 19, 2010) (App. 42-43).

According to the analysis of the State courts in this matter, confusingly one interpretation of due process applies in civil administrative proceedings and another in criminal proceedings, even though the State in both arenas seeks to deprive an individual of protected liberty and property interests. This Court makes no such distinction, and the State court decisions below are inconsistent with this Court's authority. In accordance with this Court's decision in *Santobello v. New York*, 404 U.S. 257, 263 (1971), which established "the requirement that a prosecutor's plea-bargaining promise must be kept," *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978), those faced with breaches of agreements by a State when seeking to deprive liberty or property interests must have recourse as a matter of due process.

Therefore, review should be granted in order to clarify that due process requires enforcement of agreements by a State when it seeks to deprive protected property or liberty interests, irrespective of whether the proceeding is criminal or administrative.

## CONCLUSION

For the above reasons, Dr. Hardy respectfully prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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November 23, 2010

No._____

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**In The**
**SUPREME COURT OF THE UNITED STATES**

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WILLIAM L. HARDY, M.D.,

*Petitioner,*

v.

STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,

*Respondent.*

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS*

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# APPENDIX

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STEPHEN ROSS JOHNSON*

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## TABLE OF CONTENTS

Revised Order of the Administrative Judge for the Tennessee Department of Health (May 23, 2007) ..... 3

Order Denying Petition to Reconsider by Administrative Judge for the Tennessee Department of Health (Aug. 27, 2007) ..... 7

Memorandum and Order of Chancery Court of Davidson County, Tennessee (Feb. 27, 2009) ..... 10

*Hardy v. State Dept. of Health, Div. of Health Related Boards*, No. M200900619COAR3CV, 2010 WL 175107 (Tenn. Ct. App. Jan. 19, 2010) ..... 28

Order of the Tennessee Supreme Court (Aug. 25, 2010) ..... 45

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF HEALTH

| | |
|---|---|
| IN THE MATTER OF: | BOARD OF MEDICAL EXAMINERS |
| WILLIAM LAURENCE HARDY, M.D. RESPONDENT | DOCKET NO. 17.18-090326A |
| ONEIDA, TENNESSEE TENNESSEE LICENSE NO. 28707 | |

## REVISED ORDER

Pending in this matter is a Motion to Dismiss filed by the Respondent, William L. Hardy. After a review of the pleadings, testimony of the witnesses and a full and complete review of the record, it is determined:

1. The Motion to Dismiss is denied.

2. The uncontroverted proof shows the parties reached a complete Settlement Agreement as of May 30, 2006. This is evidenced by the undisputed testimony of Rhonda Hooks, assistant general counsel for the department. Further, Schean Belton, assistant general counsel for the

department, acknowledged that an agreement had been reached, stating, "after the hearing, the department agreed to send the order to counsel for Respondent". (State's Memorandum in Response to Respondent's Motion to Dismiss, p. 5) A statement by Ms. Belton at a pre hearing conference on a Motion to Strike before this judge on July 5, 2006, acknowledged that an agreement had been reached and an Agreed Order was to be presented to the Board of Medical Examiners at their July 2, 2006 meeting.

3. The record also reflects that a prior settlement agreement was reached between the parties as evidenced by the undisputed testimony of the then Deputy General Counsel, Harry Weddle. The terms of that agreement cannot be reconstituted at this time.

4. The May 30, 2006, settlement agreement shall be presented as an Agreed Order to the Board of Medical Examiners at the May 16, 2007 meeting. This agreement shall provide, as intended by the parties, that Respondent shall pay actual and reasonable costs of prosecuting this case arising prior to May 30, 2006.

5. The Agreed Order will not be disavowed by either party. It is to be presented as any other Agreed Order is presented to the Board.

6. Neither party shall speak against the agreement but either party may speak in favor of it.

7. Pursuant to T.C.A. § 4-5-325(a)(1), all reasonable expenses incurred in this matter, including reasonable attorneys fees, arising after May 30, 2006, through May 16, 2007, shall be paid to the respondent by the State regardless of whether the Board accepts or rejects the agreement.

8. Due Process requires specific performance of the second agreement reached by the parties as of May 30, 2006. Respondent's Motion to Dismiss the charges is appropriately denied because the second agreement can be placed into effect. With payment by the State to the Respondent for his reasonable expenses incurred after May 30, 2006, this places him in as close as possible to the position he would have been in had the State honored its second agreement.

9. The first agreement cannot be placed into effect because its terms are not sufficiently certain. The State lost or otherwise misplaced the notes of Deputy General Counsel Weddle memorializing the terms of the first agreement reached, Respondent's attorney died prior to the reinstitution of this matter. Should the Board reject the Agreed Order reflecting the second agreement reached, Respondent may renew, with

further proof, his Motion to Dismiss, based on laches.

It is so Ordered.

This Order entered and effective this 23 day of May, 2007.

s/LYNN M. ENGLAND
Administrative Judge

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF HEALTH

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| IN THE MATTER OF: | BOARD OF MEDICAL EXAMINERS |
| WILLIAM LAURENCE HARDY, M.D. RESPONDENT | DOCKET NO. 17.18-090326A |
| ONEIDA, TENNESSEE TENNESSEE LICENSE NO. 28707 | |

## ORDER

A Revised Order was entered in this matter May 23, 2007, requiring the parties to submit an Agreed Order previously entered into by the parties to the Board of Medical Examiners at the September 18, 2007, meeting. A Petition for Reconsideration of this Order was timely filed on August 14, 2007.

In their motion, the state argues that the Agreed Order cannot be presented to the Board of Medical Examiners because it was not approved by Dr. Larry Arnold, the Board's consultant pursuant

to Tenn.Adm.R.&Regs 0880-2-11(4)(b) which states:

(4) "Consultants—The Board members or a physician designated by the Board are individually vested with authority as consultants to the Board to do the following acts:

(b)(4) What, if any terms of settlements should be offered in formal disciplinary matters based upon investigations conducted by the Division. A proposed settlement will not become final unless it is subsequently ratified by the Board or a duly constituted panel of the Board.

(5) Whether and under what terms a complaint, case or disciplinary action might be settled. A proposed settlement will not become final unless it is subsequently ratified by the Board or a duly constituted panel of the Board."

This regulation does not convey *absolute or sole* authority on the medical consultant. Neither does the regulation state a resolution cannot be presented to the Board of Medical Examiners or a duly constituted panel of the Board because it has not been approved by the medical consultant.

Further, it is noted, that there was no signature line for the medical consultant on the Agreed Order. Thus, the state represented all appropriate approvals to whatever extent

necessary, had been obtained.

It is therefore Ordered, that the Petition for Reconsideration of the May 23, 2007 revised Order is denied.

This Order entered and effective this 27 day of August, 2007.

s/Lynn M. England
Administrative Judge

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE, TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

| | | |
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| WILLIAM LAURENCE HARDY, M.D. | ) | |
| Petitioner, | ) | |
| vs. | ) | Case Nos. 07-596-IV |
| STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS, | ) | 07-2258-III (IV) |
| Respondent. | ) | |

MEMORANDUM AND ORDER

Petitioner, William Laurence Hardy, M.D. ("Dr. Hardy"), in these two consolidated interlocutory administrative appeals seeks: 1) dismissal of charges against him before Respondent, Tennessee Board of Medical Examiners ("Board"); or alternatively 2) an order compelling the Office of General Counsel ("OGC") for the Tennessee Department of Health ("the

Department") to produce Tennessee Bureau of Investigation ("TBI") records and other law enforcement documents. At the administrative level, Administrative Judge Lynn M. England ("Administrative Judge England" or "the Agency") denied Dr. Hardy's motion to dismiss, but ordered the parties to submit an unsigned, proposed agreed order purporting to settle the administrative charges to the Board for its consideration. Administrative Judge England, in the alternative, determined that Dr. Hardy could renew his motion to dismiss, asserting the ground of laches, if the Board did not approve the proposed agreed order. On the question of production of the TBI records and the other law enforcement documents, the Agency declined to compel production, but granted Dr. Hardy leave to pursue an interlocutory appeal to this Court.[1]

## I. Factual and Procedural Background

Petitioner filed the first of these two consolidated appeals on March 15, 2007, challenging the Board's decision to deny him access

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[1] In its Initial Order, the Agency ruled that the records should be produced. In deference to the possibility that an order compelling production was within the exclusive province of a Court, the Agency revisited this ruling and decided to not compel production of these documents.

to certain TBI and other law enforcement records.[2] Petitioner's second appeal, filed on October 9, 2008, sought review of the Board's decision denying his motion to dismiss.[3] On January 2, 2008, Chancellor Ellen Hobbs Lyle entered an Order transferring the Part III administrative appeal to Part IV. On January 24, 2008, Chancellor Richard H. Dinkins entered an Order consolidating these two interlocutory appeals. Given that Petitioner's first appeal challenges a discovery order that will become moot if the Court determines that the administrative proceedings should be dismissed, the Court will address the second appeal first. To that end, the Court makes the following findings of fact:

> 1. On or about April 5, 2006, the Division of Health Related Boards of the Tennessee Department of Health issued a Notice of Charges and Memorandum for Assessment of Civil Penalties ("Notice of Charges") against Dr. Hardy under the Tennessee Administrative Procedures Act and other applicable law. The Notice of Charges alleged that Dr. Hardy had engaged in professional misconduct

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[2] This appeal was assigned to part IV under Case No. 07-596-IV.

[3] This appeal was assigned to Part III under Case No. 07-2258-III.

related to patient "D.J.L." and to "R.B.," who was a non-patient friend of D.J.L. As to D.J.L., the Notice of Charges asserted that Dr. Hardy had engaged in unprofessional conduct, habitual intoxication or personal misuse of drugs; had inappropriately prescribed medications; and had engaged in sexual misconduct.[4] The Notice of Charges also asserted that Dr. Hardy inappropriately prescribed medicine for R.B. and that R.B. was never a patient of his. T.R. 772, ¶¶ 17-19.

2. The Notice of Charges set the matter for a contested case hearing on May 17, 2006.

3. On April 20, 2006, Dr. Hardy, through legal counsel, filed a motion to continue the contested case hearing. Over the State's objection, the Board entered an Order on May 2, 2006, continuing the contested case hearing and resetting it for September 27, 2006.

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[4] The Department alleged that Dr. Hardy "engaged in acts of a sexual nature with D.J.L. (a 17-year-old at the time) in 2002 while D.J.L. was in an unconscious state due to alcohol or drugs which Respondent provided." T.R. 771, ¶ 16.

4. On or about August 17, 2006, Dr. Hardy filed a motion to dismiss the administrative charges. In his motion, Dr. Hardy alleged that the charges should be dismissed because the State had reneged on two settlements[5] and the State's delay in pursuing the case had prejudiced Dr. Hardy's ability to defend himself against the charges.

5. On or about August 21, 2006, Dr. Hardy filed a companion motion seeking a continuance and discovery related to the motion to dismiss.

6. On August 28, 2006, Administrative Law Judge England continued the September 27, 2006, contested case hearing and reset it for January 24, 2007. This Order also set a briefing and discovery schedule.

7. On or about September 22, 2006, the State filed a motion to strike Dr. Hardy's motion to dismiss. Through

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[5] Dr. Hardy asserted that the first settlement had been reached prior to the issuance of the Notice of Charges and that the second settlement was reached on or about May 25, 2006.

its motion, the State raised procedural issues, urging that Dr. Hardy's motion was facially deficient.

8. On or about September 27, 2006, the State moved to strike Dr. Hardy's request for admissions.

9. On October 3, 2006, the State filed a response to Dr. Hardy's motion to dismiss.

10. On or about October 19, 2006, Dr. Hardy filed his opposition to the State's motion to strike.

11. On or about October 24, 2006, Dr. Hardy filed a motion seeking relief from the scheduling order and requesting a hearing on pending discovery motions.

12. On November 21, 2006, Administrative Judge England entered an Order setting new deadlines, sealing D.J.L.'s juvenile court records, denying Dr. Hardy's motion to compel production of TBI records, and indicating that the tribunal would grant either side an interlocutory appeal if they sought

one.

13. On January 9, 2007, Administrative Judge England entered an Order continuing the contested case hearing until May 15 and 16, 2007, which Order also addressed several discovery disputes.

14. On April 9, 2007, Dr. Hardy filed briefs and supplemental materials in support of his motion to dismiss.

15. On April 23, 2007, the State filed a memorandum opposing Dr. Hardy's motion to dismiss.

16. On April 27, 2007, Dr. Hardy filed his reply.

17. On May 8, 2007, Administrative Judge England entered an Order denying the motion to dismiss, but requiring the parties to submit (and to not disavow) the second proposed settlement agreement, dated May 30, 2006, to the Board for approval. Administrative Judge England also awarded attorneys' fees against the State. The Court concluded that the first agreement could not be submitted

to the Board because "its terms are not sufficiently certain." T.R. 54.

18. On or about May 23, 2007, Administrative Judge England entered an Order allowing the parties to delay submitting the proposed settlement agreement order to the Board pending further efforts to explore settlement.

19. On August 14, 2007, the State asked Administrative Judge England to reconsider and set aside the Order of May 23, 2007.

20. On August 14, 2007, Administrative Judge England entered an Order activating the Order entered on May 8, 2007.

21. On or about August 23, 2007, Dr. Hardy filed a motion seeking an interlocutory appeal of the denial of the motion to dismiss.

22. The Agency entered an Order on August 27, 2007,denying the State's motion for reconsideration.

23. On September 5, 2007, the

Agency entered an Order staying the effectiveness of the prior order pending Dr. Hardy's interlocutory appeal to Chancery Court.

24. Prior to the Agency's consideration of Dr. Hardy's motion to dismiss, Dr. Hardy filed a motion to compel the records of a TBI investigation that had been conveyed to the Department. Initially, the Agency held that these records could be produced. In an Order entered on January 27, 2007, however, Administrative Judge England declined to order the production because of the State's contention that only a court could compel this production. In that same Order, the Agency granted Dr. Hardy leave to pursue this interlocutory appeal.

II. Standard of Review

Judicial review of the Agency's decision is confined to the administrative record, and the Agency's findings are entitled to considerable deference. *See Metropolitan Gov't of Nashville v. Shacklett,* 554 S.W.2d 601 (Tenn. 1977). The Court may not substitute its judgment for that of the Agency, even when the evidence could support a different result. *See Wayne County v. Tennessee*

*Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988). Pursuant to Tenn. Code Ann. § 4-5-322(h), this Court may reverse or modify the Agency's decision only if the petitioner's rights have been prejudiced because the Agency's decision is:

> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) Unsupported by evidence which is both substantial and material in light of the entire record.

*Id.* No agency's decision in a contested case shall be reversed, remanded or modified unless for errors which effect the merits of the decision. *See* Tenn. Code Ann. § 4-5-322(i).

In determining whether the Agency's decision is based on substantial and material evidence, this Court must determine if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." *Clay County Manor v. State*

*Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993). The Court may not reweigh the evidence, and the Agency's decision need not be supported by a preponderance of the evidence. *See Humana of Tenn. v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977); *Street v. State Bd. of Equalization*, 812 S.W.2d 583, 585-86 (Tenn. Ct. App. 1990). An agency's decision is arbitrary and capricious if it is not based on any course of reasoning or exercise of judgment, or if there is a clear error in judgment.[6] *See* Tenn. Code Ann. § 4-5-322(h)(4); *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W. 2d 106, 110-11 (Tenn. Ct. App. 1993).

III. Discussion

Based upon the findings of fact, the Court's

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[6] "Agency decisions not supported by substantial and material evidence are arbitrary and capricious . . . [A]gency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W. 2d 106, 110 (Tenn. Ct. App. 1993). An "arbitrary" decision is one not based upon any course of reasoning or exercise of judgment or is one that disregards "the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* At 111. Evidence is sufficient "if it furnishes a reasonably sound factual basis for the decision being reviewed." *Id.*

review of the record, and the above-referenced standard, the Court makes the following conclusions of law:

1. The alleged first agreement to resolve the charges against Dr. Hardy, purportedly reached in 2004, was never memorialized in a Settlement Agreement or memorandum of understanding that would be enforceable against the State. The purported agreement was not signed by a representative of the State.

2. Distinguished counsel's letter of July 24, 2005, prepared a year after the alleged first agreement, is not an agreement and cannot be interposed to bind the State or serve as the predicate for a due process violation.

3. The proposed unsigned agreed order of May 30, 2006, the alleged second agreement, is not a binding agreement.[7] Given the Court's conclusion that the two proposed settlement agreements were not

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[7] It is arguable that Dr. Hardy's conduct in attempting to negotiate a "second" settlement in 2006 with different terms corroborates the Court's conclusion that the parties did not reach an enforceable agreement in 2004.

binding agreements, it follows that there was no breach.

4. The parties did not finalize their negotiations or voluntarily, by mutual agreement, submit any agreement through the approval process. *See* Tenn. Adm. R. & Regs. 0880-2-11(4)-(5). This applies to both proposed settlements. *See Higgins v. Oil, Chem. & Atomic Workers Int'l Union*, 811 S.W. 2d 875, 879. (Tenn. 1991).

5. This is an appeal of a civil administrative proceeding regarding professional licensure, and there is no companion criminal case. As such, Dr. Hardy's reliance on criminal constitutional jurisprudence for the standard of what constitutes an enforceable agreement or an enforceable settlement in this civil context is misplaced. *See Jones v. Greene*, 946 S.W.2d 817 (Tenn. Ct. App. (1996). Even though the courts may borrow from criminal jurisprudence, this appeal is governed by civil legal standards. *See Welch v. Board of Prof'l Responsibility*, 193 S.W.3d 457, 465 (Tenn. 2006).

6. In other contexts, it is clear that

> the State cannot be bound to a proposed settlement agreement or a contract based on letters from opposing counsel, unsigned memoranda or orders, oral promises, or the recommendation of counsel for the State. *See* Tenn. Code Ann. § 20-13-103; 47-18-107(a); 2-11-201(d). Although these particular statutory provisions and related concerns about the public treasury are not implicated here, concern about what is in the public interest is implicated here. The public interest should not necessarily be eclipsed by concerns about promises that may have been made by former counsel for the State when current counsel for the State and current officials, who are presumed to be operating in good faith and in the public interest, decide to use their independent professional judgment to handle an administrative proceeding in a fashion that might differ from prior indications. *See State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle,* 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001).

Based upon the foregoing conclusions of law, the Court hereby REVERSES the Agency's finding that the State reached two agreements to resolve

the charges against Dr. Hardy. Courts and other tribunals are not authorized to compel parties to be bound by the terms of an agreed order that one or more of the parties refuses to sign. *See Harbour v. Brown*, 732 S.W. 2d 598 (Tenn. 1987). Parties may effectively withdraw their consent to an agreed order before it is submitted. *See id.* at 599. The Court determines, therefore, that the Agency committed prejudicial error in directing that the proposed agreed order dated May 30, 2006, be treated as a fully signed, enforceable agreement between the parties and in directing that it be submitted to the Board for approval.

Given that the Court has concluded that no enforceable agreement or settlement was ever reached by the parties, the Court DENIES Dr. Hardy's due process claim. In examining the record and the applicable law in the interlocutory review of the Agency's decision to Deny Petitioner's motion to dismiss, the Court concludes that there has been no violation of Dr. Hardy's right to due process. *See Newton v. Cox*, 878 S.W. 2d 105, 111 (Tenn. 1994); *Martin v. Beer Bd. of City of Dickson*, 908 S.W.2d 941 (Tenn. Ct. App. 1995). Dr. Hardy has an opportunity for due process in the contested case proceeding. *See Bobbitt v. Shell*, 115 S.W. 3d 506, 510 (Tenn. Ct. App. 2003). If Dr. Hardy has actually been prejudiced by delay that is attributable to the State, the Administrative Judge may consider appropriate sanctions or other appropriate relief. For this reason, the Court

DIRECTS the Administrative Judge to RECONSIDER her decision to award attorneys' fees, at the appropriate time, in light of this Court's ruling.

The Court determines that the Agency committed no error in its initial decision that the TBI records were discoverable. The records appear to be relevant, and in fairness, should be produced, given that the Department already has these records in its possession for potential use in the preparation of the administrative case. The production of these records does not violate the TBI exception to the Public Records Act. *See Chattanooga Pub'g Co. v. Hamilton County Election Comm'n*, No. E2003-00076-COA-R3-CV, 2003 WL 22469808, at *1 (Tenn. Ct. App. Oct. 31, 2003). The Court, therefore, DIRECTS the parties to promptly present any reasonable, good faith concerns about appropriate procedural safeguards (whether there should be a protective order or a seal order) to the Administrative Judge before the State actually produces the records.

IV. Conclusion

For the foregoing reasons, the Court AFFIRMS the Agency's denial of Dr. Hardy's Motion to Dismiss; REVERSES the Agency's conclusion that the parties reached enforceable agreements to resolve the charges against Dr. Hardy on two occasions; VACATES the Agency's

Order directing the parties to submit an unsigned, proposed agreed order for approval to the Board; and DIRECTS the State to produce the TBI records and related materials to Dr. Hardy after the parties pursue reasonable, good faith safeguards. The Court REMANDS this matter to the Agency for proceedings consistent with this Memorandum and Order.[8] Costs of this cause, including facsimile filing fees, are taxed to Petitioner, William Laurence Hardy, M.D., for which execution may issue if necessary.

IT IS SO ORDERED.

S/RUSSELL T. PERKINS,
CHANCELLOR

cc: Wade V. Davies, Esq.
Stephen Ross Johnson, Esq.
Sue A. Sheldon, Esq.
Sara E. Sedgwick, Esq.

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[8] This Court does not specifically reach the Agency's decision to consider dismissal of the charges on the grounds of laches, but the Court suggests that the Agency consider other applicable law for any potential dismissal first, given that the equitable doctrine of laches usually applies to equitable claims. *See In Re Estate of Darwin*, 503 S.W. 2d 511 (Tenn. 1973).

Rule 58 Certification

A Copy of this order has been served by U.S. mail upon all parties or their counsel names above.

s/Deputy Clerk and
Master, Chancery Court
2/27/09

IN THE COURT OF APPEALS OF TENNESSEE
AT NASVILLE
December 2, 2009 Session

**WILLIAM LAURENCE HARDY, M.D. v. STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS**

Direct Appeal from the Chancery Court
For Davidson County
No. 07-596-IV, 07-2258-III-(IV)
Russell Perkins, Chancellor

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No. M2009-00619-COA-R3-CV

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This is an appeal from the decision of the Chancery Court, reversing a decision of an administrative judge. The administrative judge denied Appellant's Motion to Dismiss, but found the parties had entered into two separate agreements and ordered the parties to submit an agreed order to the Medical Board for review. On appeal, the Chancery Court, in reversing the decision of the administrative judge, found that the parties had not entered into any agreements and that the administrative judge could not order the parties to enter into a consent order. Appellant appeals from

this decision, contending that the parties have entered into two separate agreements and that due process requires this action be dismissed. Upon review of the record, we find material facts in dispute. Therefore the administrative judge erred in finding that the parties entered into two agreements, and the Chancery Court erred in finding that the parties did not enter into any agreements. Further, we affirm the Chancery Court in finding that the administrative judge erred in ordering the parties to submit an agreed order to the Medical Board after the Appellee withdrew its consent. Affirmed in part, reversed in part and remanded.

**Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part and Remanded**

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Stephen Ross Johnson, Wade V. Davies, Knoxville, Tennessee, for the appellant, William Laurence Hardy, M.D.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sue A. Sheldon, Senior Counsel, for appellee, State of Tennessee, Department of Health, Division of Health Related Boards.

## OPINION

On April 5, 2006, Appellee State of Tennessee Department of Health, Division of Health Related Boards ("State") filed Notice of Charges against Appellant William Laurence Hardy, M.D. ("Dr. Hardy").[1] Dr. Hardy responded on April 17, 2006, by filing a Motion to Dismiss. In his Motion to Dismiss, Dr. Hardy argued violations of due process, and prior accord and satisfaction. Dr. Hardy attached to his Motion: (1) the depositions of Henry Weddle and Rhonda Hooks-Kendrick and the exhibits thereto, (2) a letter dated July 12, 2005, to Dr. Hardy from Andrei Lee, Assistant General Counsel for the State, and (3) a letter dated July 18, 2006, from Stephen Johnson, counsel for Dr. Hardy, to Laurie Doty and Schean Belton, counsel for the State. The State filed a response to Dr. Hardy's Motion to Dismiss along with a Motion to Strike Dr. Hardy's Motion to Dismiss.

The administrative judge held a telephonic hearing on Dr. Hardy's Motion to Dismiss on May 1, 2007. During this hearing, the administrative judge heard arguments from both parties on the Motion to Dismiss. After hearing arguments, and reviewing "the pleadings, testimony of the

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[1] We note that Dr. Hardy's name appears both as William Laurence Hardy and William Lawrence Hardy throughout the record.

witnesses and a full and complete review of the record," the administrative judge denied the Motion to Dismiss.[2] However, in addition to denying the Motion to Dismiss, the administrative judge found that the "uncontroverted proof" showed that the parties reached a settlement agreement resulting in an "Agreed Order" in May 2006, and had reached another settlement agreement prior to the alleged 2006 agreement. The administrative judge found that the first agreement could not be "reconstituted." Pursuant to these findings, the administrative judge ordered that the "Agreed Order" be presented to the Medical Board and that neither party speak against the "Agreed Order." The administrative judge ordered the State to pay all expenses incurred after May 2006, including attorney fees. The administrative judge found that Due Process required specific performance, but that dismissal was not necessary because the "Agreed Order" could be entered. The administrative judge also held that Dr. Hardy should be allowed to renew his Motion to Dismiss on the basis of laches if the Medical Board did not approve the Agreed Order. When issuing her ruling, the administrative

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[2] The testimony the administrative judge considered was the depositions of Henry Weddle and Rhonda Hooks-Kendrick that were attached to Dr. Hardy's Motion to Dismiss. From our review of the record, it does not appear that any additional evidence was presented at the hearing on Dr. Hardy's Motion to Dismiss.

judge also denied the State's Motion to Strike Dr. Hardy's Motion to Dismiss. On May 8, 2007, the administrative judge entered an order reflecting this decision.

Pursuant to both parties' request, the administrative judge held the May 8, 2007, Order in abeyance to allow the parties time to further negotiate the matter. On August 14, 2007, finding that the parties were unable to reach an agreement, the administrative judge entered an order placing the prior decision into effect. The State filed a Petition for Reconsideration, which the administrative judge denied.

Dr. Hardy filed an interlocutory appeal in the Chancery Court pursuant to Tenn. Code. Ann. § 4-5-322(a)(1),[3] appealing the denial of his Motion to Dismiss.[4] After reviewing the administrative

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[3] Tenn. Code Ann. § 4-5-322(a)(1) provides in pertinent part, that "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

[4] This appeal was combined with another interlocutory appeal by Dr. Hardy, appealing the administrative judge's denial of Dr. Hardy's motion to compel the State to produce Tennessee Bureau of Investigation records. Dr. Hardy did not appeal the Chancery Court's decision on this issue and therefore we do not consider it on

record, the Chancery Court entered an order on February 27, 2009, affirming the administrative judge's denial of the Motion to Dismiss, but reversing the decision of the administrative judge finding two settlement agreements. The Chancery Court made the following conclusions of law: (1) the first agreement was never memorialized in a way that would be enforceable against the state or signed by a representative of the State; (2) the July 24, 2005, letter from Dr. Hardy's former counsel is not an agreement that could bind the State or "serve as a predicate for a due process violation"; (3) the unsigned Agreed Order from 2006 is not a binding agreement; (4) because there were no binding agreements, there can be no breach; (5) the parties had not finalized their agreements, nor submitted them to the approval process; (6) Dr. Hardy's reliance on criminal constitutional jurisprudence is misplaced and this appeal is governed by civil legal standards; and (7) the State cannot be bound by "a proposed settlement agreement or a contract based on letters from opposing counsel, unsigned memoranda or orders, oral promises, or the recommendation of counsel for the State." The Chancery Court reiterated that it was concluding that the parties did not reach any enforceable settlement agreement. The Chancery Court also held that courts may not compel parties to be bound by an unsigned agreed order, as a party may withdraw his or her consent before the order is submitted. Finding that there were no enforceable

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appeal.

agreements, the Chancery Court held that Dr. Hardy's due process rights had not been violated. The Chancery Court reasoned that Dr. Hardy had an opportunity for due process in the contested hearing, and that, if he had been prejudiced, the administrative judge could then consider any appropriate sanctions.

Dr. Hardy appeals the decision of the Chancery Court. He submits the following issues for our review:

1. Whether the Chancery Court erred reversing the administrative judge's finding that the parties had entered into two separate settlement agreements?

2. Whether the administrative judge erred in determining that the first agreement could not be reconstituted?

3. Whether due process requires dismissal of the administrative proceeding against Dr. Hardy's medical license?

## Standard of Review

All disciplinary proceedings against medical licensees are to be conducted in accordance with the Uniform Administrative Procedures Act ("UAPA"). Tenn. Code Ann. § 63-6-216. Accordingly, this Court reviews the administrative decision under the same standard as the trial court.

*Miller v. Tenn. Board of Nursing*, 256 S.W.3d 225, 229 (Tenn.Ct.App.2007). The standard of review is set forth in Tenn. Code Ann. § 4-5-322(h), which provides:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, or conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5)(A) Unsupported by evidence that is both substantial and material in light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into

> account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322.

The court reviewing an administrative decision must use a three step analysis. *Dillard Smith Constr. Co. v. Comm'r of Labor and Workforce Dev.*, 2009 WL 4841073, No. M2008-00735-COA-R3-CV at *4 (Tenn.Ct.App.2009). "First, the court must determine whether the agency identified the appropriate legal principles applicable to the case." *Id.* (citing *McEwen v. Tenn. Dept. Of Safety*, 173 S.W.3d 815, 820 (Tenn.Ct.App.2005). Next, the court must review the agency's factual findings and determine whether they are supported by substantial and material evidence. *Id.* Third, the court must examine how the agency applied the law to the facts. *Id.* In reviewing the trial court's review of an administrative decision, this Court must determine whether the trial court applied the proper standard of review. *Papachristou v. Univ. of Tenn.*, 29 S.W.3d 487, 490 (Tenn.Ct.App.2000).

## Analysis

This appeal centers on Dr. Hardy's Motion to Dismiss. The UAPA "directs the [administrative judge] to permit the parties to submit motions at

appropriate stages in the proceedings." *Yokley v. State Bd. of Educ.*, 2009 WL 1410225, NO. M2008-00679-COAR3-CV, at *3 (citing Tenn. Code Ann. § 4-5-308(a)(2005)). Further, the Tennessee Department of State rules allow parties to seek relief through motions. Tenn. Comp. R. & Regs. 1360-4-1-.09 (2004). Accordingly, the administrative judge has the authority to hear and rule on motions to dismiss. However, the administrative judge must apply the proper legal principles when ruling on a motion. The Tennessee Department of State rules require that the administrative judge apply the Tennessee Rules of Civil Procedure in any situation not otherwise specifically addressed. Tenn. Comp. R. & Regs. 1360-4-1-.01(3)(2004). Finding no other rule or statute on how the administrative judge is to approach a motion to dismiss, we will review the administrative judge's decision based on the Tennessee Rules of Civil Procedure.

If a party files a motion to dismiss for failure to state a claim and includes matters outside the pleadings, the trial court, upon considering the material outside the pleadings, must review the motion as a motion for summary judgment pursuant to Tenn. R. Civ. P. 56. Tenn. R. Civ. P. 12.02; see also *Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn.Ct.App.2006). In this case, the administrative judge stated that she had reviewed and considered the pleadings, testimony of the witnesses, and the record, in making her decision. Therefore, we review the administrative decision

based on the standards required for a motion for summary judgment.

When a motion for summary judgment is made, the moving party has the burden of showing that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. The moving party may accomplish this by either: (1) affirmatively negating an essential element of the non-moving party's claim; or (2) showing that the non-moving party will not be able to prove an essential element at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn.2008). However, "[i]t is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." *Id.* at 8. If the moving party's motion is properly supported, "[t]he burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5(citing *Byrd v. Hall*, 847 S.W.2d 208, 215(Tenn.1993)). The nonmoving party may accomplish this by: "(1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for the trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06." *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 84 (Tenn.2008) (citations omitted).

When reviewing the evidence, we must determine whether factual disputes exist. In evaluating the decision to grant summary judgment, we review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn.2003). If we find a disputed fact, we must "determine whether the fact is material to the claim or defense upon which summary judgment is predicated and whether the disputed fact creates a genuine issue for trial." *Mathews Partners*, 2009 WL 3172134 at *3(citing Byrd, 847 S.W.2d at 214). "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A genuine issue exists if "a reasonable jury could legitimately resolve the fact in favor of one side or the other." *Id.*

In this case, the administrative judge denied Dr. Hardy's motion. We have reviewed the record and find that there are material issues of fact in dispute. The parties dispute whether and when any agreement was entered into, who had authority to enter into any such agreement, what the proper procedure is to settle the action, and what the terms were of any enforceable agreement. Accordingly, the administrative judge was correct in denying Dr. Hardy's motion.

However, the administrative judge, after

denying the motion, went on to make the factual finding that the parties had entered into two separate agreements and to order the parties to submit the "Agreed Order" to the Medical Board. By doing so, the administrative judge failed to follow the proper legal procedure. A motion for summary judgment is not a substitute for a trial on the merits. *Byrd*, 847 S.W.2d at 210. "[T]he purpose of a summary judgment proceeding is not the finding of facts, the resolution of disputed material facts, or the determination of conflicting inferences reasonably drawn from those facts. 'The purpose is to resolve controlling issues of law, and that alone.' " *Id.* at 215 (citations omitted). In considering Dr. Hardy's motion, the administrative judge was to first determine whether there were material facts in dispute. Only upon finding that there were no material facts in dispute could the administrative judge grant the motion and enter any appropriate order. If the administrative judge found material facts in dispute, the analysis should have ended there, with the administrative judge denying the motion and scheduling the case for an evidentiary hearing. The trial court, in ruling on a motion for summary judgment, is not to weigh the evidence. *Id.* Here the administrative judge, despite the existence of disputed material facts, weighed the evidence, made factual determinations and entered an order. By failing to follow the proper legal principles for a motion for summary judgment, the administrative judge erred.

Moreover, the administrative judge,

regardless of whether there was in fact a prior agreement, erred by ordering the parties to submit the "Agreed Order" to the Medical Board and requiring that neither party speak against the order. "[A] valid consent judgment cannot be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to entry of the judgment." *Harbour v. Brown*, 737 S.W.2d 598. 599 (Tenn.1987) (citations omitted). The parties must consent at the time the agreement is presented to the court. *Id.* Until the order is entered by the court, either party may withdraw its consent. *Id.* "This is not to say that the compromise agreement may not be a binding contract, subject to being enforced as other contracts, but only that the court may not enter judgment based on the compromise agreement, when it has notice that one of the parties is no longer consenting...." *Id.*

Tenn. Adm. R. & Regs. 0880-2-.11 requires the Medical Board to approve any settlement agreement before the agreement may become final. Accordingly, either party may withdraw its consent until the agreement is presented to the Medical Board. In this case, the State disputes that it ever agreed to settle the claim against Dr. Hardy. Therefore, consent, if any, was withdrawn before the agreement was presented to the Medical Board for approval. Consequently, the administrative judge erred in ordering the parties to present the "Agreed Order" to the Medical Board.

## Due Process

Our opinion renders all remaining issues moot. Nevertheless in the interest of judicial economy and because the administrative judge held that due process required specific performance, and Dr. Hardy relies significantly on the due process argument, we will briefly address that issue. Dr. Hardy contends on appeal that, because the parties have twice settled the claim, due process requires that this action be dismissed. "A professional license, issued by a State, which can be suspended or revoked only upon a showing of cause, is a constitutionally protected property interest because the holder of the license has a clear expectation that he or she will be able to continue to hold the license absent proof of culpable conduct." *Martin v. Sizemore*, 78 S.W.3d 249, 262-63 (Tenn.Ct.App.2001)(citing *Barry v. Barchi*, 443 U.S. 55, 64 & n. 1, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979)). The Tennessee Supreme Court recognized the right to practice medicine as a constitutionally protected property interest in 1924. *State Bd. Of Med. Exam'rs v. Friedman*, 150 Tenn. 152, 263 S.W. 75, 79 (Tenn.1974). A person's liberty or property interest cannot be taken away without due process. U.S. Const. amend. V. & IV; Tenn. Const. Art 1, § 8.

Generally, due process requires notice and opportunity to be heard. *Miller v. Tenn. Bd. Of Nursing*, 265 S.W.3d 225, 234 (Tenn.Ct.App.2007)(citing *Manning v. City of*

*Lebanon*, 124 S.W.3d 562, 566 Tenn.Ct.App.2003)). Dr. Hardy has not provided this Court with any authority requiring his case to be dismissed and we find none in our case law. Moreover, whether the claim has been settled at all remains in dispute. The UAPA provides for procedural safeguards in contested medical license revocation cases. See *Watts v. Burkhart*, 978 F.2d 269, 275 (6th Cir.1992). UAPA procedure "scrupulously protects the fundamental right of notice and opportunity to be heard ..." *Id.* Dr. Hardy has not alleged that he was not provided either sufficient notice of the charges against him, or an opportunity to be heard. In fact, from our review of the record, it appears that a contested hearing was set when Dr. Hardy appealed from the administrative judge's decision and was stayed pursuant to his request. Accordingly, we do not find that due process requires dismissal of the action. Dr. Hardy has been afforded due process by being given proper notice of the charges and an opportunity to be heard, where he may present evidence of the alleged settlement agreements and evidence disputing the substantive allegations.

## Conclusion

In sum, we find that the Chancery Court did not err in reversing the decision of the administrative judge finding that the parties had entered into two separate settlement agreements. The Chancery Court, however, did err by not finding that the administrative judge applied

improper legal principles in reviewing Dr. Hardy's motion and making the findings that the parties had entered into two separate settlement agreements. While the administrative judge denied Dr. Hardy's motion, it effectively granted summary judgment by finding that the parties had entered into two separate agreements. Further, we find that the Chancery Court also applied improper legal principles when it found that the parties had not entered into any enforceable agreements. Because there are disputed material facts, it cannot yet be determined whether there are any enforceable agreements. Additionally, we find that the Chancery Court correctly held that the administrative judge did not have the authority to order the parties to present the "Agreed Order" to the Medical Board after the State withdrew its consent.

For the foregoing reasons we affirm in part and reverse in part the decision of the Chancery Court and remand for entry of an order in accordance with this decision. Costs of this appeal are taxed equally against the Appellant, William Laurence Hardy, M.D., and his surety, and the Appellee, State of Tennessee, Department of Health Division of Health Related Boards, for which execution may issue if necessary.

/s/ J. Steven Stafford
J. STEVEN STAFFORD,
JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**WILLIAM LAURENCE HARDY, M.D. V. STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS**

Chancery Court for Davidson County
Nos. 07-596-IV, 07-2258-III (IV)

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No. M2009-00619-SC-R11-CV

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**ORDER**

Upon consideration of the application for permission to appeal of William Laurence Hardy, M.D., and the record before us, the application is denied.

The opinion of the Court Appeals is designated "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E).

PER CURIAM

181 (1)

No. 10-725

# In the Supreme Court of the United States

WILLIAM LAURENCE HARDY,
*Petitioner*,

v.

TENNESSEE DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,
*Respondent*.

*On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Middle Division*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether constitutional due process guarantees require dismissal of the civil administrative charges against the petitioner's medical license on the basis of his allegations that the state breached two settlement agreements with him, where the existence of any such agreement remains in dispute.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINION BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING REVIEW ..... 7

I. THE TENNESSEE COURT OF APPEALS' DECISION IMPLICATES NO IMPORTANT QUESTION OF FEDERAL LAW ..... 8

II. THE COURT OF APPEALS' DISCUSSION, IN *DICTUM*, OF PETITIONER'S DUE PROCESS CLAIMS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT ..... 10

CONCLUSION ..... 12

# TABLE OF AUTHORITIES

## CASES

*Harbour v. Brown*,
732 S.W.2d 598 (Tenn. 1987) . . . . . 9

*Santobello v. New York*,
404 U.S. 257 (1971) . . . . . 11, 12

*Schware v. Board of Bar Examiners of State of N.M.*,
353 U.S. 232 (1957) . . . . . 11

*Watts v. Burkhart*,
978 F.2d 269 (6th Cir. 1992) . . . . . 6, 7

## CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. XIV . . . . . 1

## STATUTES

28 U.S.C. § 1257(a) . . . . . 1

Tenn. Code Ann. § 4-5-322(a)(1) . . . . . 3

## OTHER AUTHORITIES

Sup. Ct. R. 10 . . . . . 8

Sup. Ct. R. 10(c) . . . . . 7

Tenn. Adm. R. & Regs. 0880-02-.11 . . . . . 6, 9

Tenn. Sup. Ct. R. 4(E) . . . . . 1, 7, 10

## OPINION BELOW

The January 19, 2010, decision of the Tennessee Court of Appeals is unpublished and designated "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45). The decision of the Davidson County Chancery Court is also unpublished. (Pet. App. 10).

## STATEMENT OF JURISDICTION

The opinion of the Tennessee Court of Appeals was filed on January 19, 2010. (Pet. App. 28). On August 25, 2010, the Tennessee Supreme Court denied review and designated the Court of Appeals' opinion "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45). Petitioner filed a petition for writ of certiorari on November 23, 2010, invoking the jurisdiction of this Court under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner invokes the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which reads in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., Amend. XIV.

## STATEMENT OF THE CASE

The opinion of the Tennessee Court of Appeals adequately sets forth the pertinent facts and procedural history:

On April 5, 2006, Appellee State of Tennessee Department of Health, Division of Health Related Boards ("State") filed Notice of Charges against Appellant William Laurence Hardy, M.D. ("Dr. Hardy"). Dr. Hardy responded on April 17, 2006, by filing a Motion to Dismiss. In his Motion to Dismiss, Dr. Hardy argued violations of due process, and prior accord and satisfaction. Dr. Hardy attached to his Motion: (1) the depositions of Henry Weddle and Rhonda Hooks-Kendrick and the exhibits thereto, (2) a letter dated July 12, 2005, to Dr. Hardy from Andrei Lee, Assistant General Counsel for the State, and (3) a letter dated July 18, 2006, from Stephen Johnson, counsel for Dr. Hardy, to Laurie Doty and Schean Belton, counsel for the State. The State filed a response to Dr. Hardy's Motion to Dismiss along with a Motion to Strike Dr. Hardy's Motion to Dismiss.

The administrative judge held a telephonic hearing on Dr. Hardy's Motion to Dismiss on May 1, 2007. During this hearing the administrative judge heard arguments from both parties on the Motion to Dismiss. After hearing arguments, and reviewing "the pleadings, testimony of the witnesses and a full and complete review of the record," the administrative judge denied the Motion to Dismiss. However, in addition to denying the Motion to Dismiss, the administrative judge found that the "uncontroverted proof" showed that the parties reached a settlement agreement resulting in an "Agreed Order" in May 2006, and had reached another settlement agreement prior to the alleged 2006 agreement. The

administrative judge found that the first agreement could not be "reconstituted." Pursuant to these findings, the administrative judge ordered that the "Agreed Order" be presented to the Medical Board and that neither party speak against the "Agreed Order." The administrative judge ordered the State to pay all expenses incurred after May 2006, including attorney fees. The administrative judge found that Due Process required specific performance, but that dismissal was not necessary because the "Agreed Order" could be entered. The administrative judge also held that Dr. Hardy should be allowed to renew his Motion to Dismiss on the basis of laches if the Medical Board did not approve the Agreed Order. When issuing her ruling, the administrative judge also denied the State's Motion to Strike Dr. Hardy's Motion to Dismiss. On May 8, 2007, the administrative judge entered an order reflecting this decision.

Pursuant to both parties' request, the administrative judge held the May 8, 2007 Order in abeyance to allow the parties time to further negotiate the matter. On August 14, 2007, finding that the parties were unable to reach an agreement, the administrative judge entered an order placing the prior decision into effect. The State filed a Petition for Reconsideration, which the administrative judge denied.

Dr. Hardy filed an interlocutory appeal in the Chancery Court pursuant to Tenn. Code Ann. § 4-5-322(a)(1), appealing the denial of his

Motion to Dismiss. After reviewing the administrative record, the Chancery Court entered an order on February 27, 2009, affirming the administrative judge's denial of the Motion to Dismiss, but reversing the decision of the administrative judge finding two settlement agreements. The Chancery Court made the following conclusions of law: (1) the first agreement was never memorialized in a way that would be enforceable against the state or signed by a representative of the State; (2) the July 24, 2005 letter from Dr. Hardy's former counsel is not an agreement that could bind the State or "serve as a predicate for a due process violation"; (3) the unsigned Agreed Order from 2006 is not a binding agreement; (4) because there were no binding agreements, there can be no breach; (5) the parties had not finalized their agreements, nor submitted them to the approval process; (6) Dr. Hardy's reliance on criminal constitutional jurisprudence is misplaced and this appeal is governed by civil legal standards; and (7) the State cannot be bound by "a proposed settlement agreement or a contract based on letters from opposing counsel, unsigned memoranda or orders, oral promises, or the recommendation of counsel for the State." The Chancery Court reiterated that it was concluding that the parties did not reach any enforceable settlement agreement. The Chancery Court also held that courts may not compel parties to be bound by an unsigned agreed order, as a party may withdraw his or her consent before the order is submitted. Finding that there were no enforceable agreements, the Chancery Court held that Dr.

> Hardy's due process rights had not been violated. The Chancery Court reasoned that Dr. Hardy had an opportunity for due process in the contested hearing, and that, if he had been prejudiced, the administrative judge could then consider any appropriate sanctions.

(Pet. App. 30-34) (footnotes omitted).

Dr. Hardy timely appealed the Davidson County Chancery Court's decision. On January 19, 2010, the Court of Appeals affirmed in part and reversed in part. The Court determined that there were material issues of fact in dispute with respect to the issues raised by Dr. Hardy's Motion to Dismiss, which it reviewed under the standards required for a motion for summary judgment, because the administrative judge had considered material outside the pleadings. (Pet. App. 37-38). The material issues of disputed fact concerned whether and when any settlement agreement was entered into, who had authority to enter into any such agreement, what the proper procedure was to settle the action, and what the terms were of any enforceable agreement. (Pet. App. 39). Thus, the Court of Appeals determined that the administrative judge had properly and correctly denied Dr. Hardy's dispositive motion. (Pet. App. 39).

Additionally, the Court of Appeals determined that the administrative judge had failed to follow proper legal procedure because, despite the existence of disputed material facts, she had weighed the evidence, made the factual finding that the parties had entered into two separate agreements, and ordered the parties to submit the "Agreed Order" to the Board of Medical Examiners. (Pet. App. 40-41). Furthermore, a Board

of Medical Examiners' regulation, Tenn. Adm. R. & Regs. 0880-02-.11, required that the Board approve any settlement agreement before the agreement could become final. Accordingly, either party could withdraw its consent until the agreement was presented to the Board. (Pet. App. 41). In this case, since the State disputed that it had ever agreed to settle its claim against Dr. Hardy, consent, if any, was withdrawn before the agreement was presented to the Medical Board for approval. Consequently, the Court of Appeals held that the administrative judge had erred in ordering the parties to present the "Agreed Order" to the Medical Board. (Pet. App. 41).

Finally, the Court of Appeals noted, in *dictum*, that it found unpersuasive Dr. Hardy's claim that due process required dismissal of the administrative charges against his medical license because of the state's alleged breach of settlement agreements with him. (Pet. App. 43). The Court of Appeals stated that the right to practice medicine is a constitutionally protected property interest, and that a person's liberty or property interest cannot be taken away without due process. (Pet. App. 42). However, it concluded that:

> Dr. Hardy has not provided this Court with any authority requiring his case to be dismissed and we find none in our case law. Moreover, whether the claim has been settled at all remains in dispute. The UAPA [Tennessee Uniform Administrative Procedures Act] provides for procedural safeguards in contested medical license revocation cases. See *Watts v. Burkhart*, 978 F.2d 269, 275 (6th Cir. 1992). UAPA procedure "scrupulously protects the fundamental right of notice and opportunity to

> be heard . . ." *Id.* Dr. Hardy has not alleged that he was not provided either sufficient notice of the charges against him, or an opportunity to be heard. In fact, from our review of the record, it appears that a contested hearing was set when Dr. Hardy appealed from the administrative judge's decision and was stayed pursuant to his request. Accordingly, we do not find that due process requires dismissal of the action. Dr. Hardy has been afforded due process by being given proper notice of the charges and an opportunity to be heard, where he may present evidence of the alleged settlement agreements and evidence disputing the substantive allegations.

(Pet. App. 43).

Dr. Hardy filed an application for permission to appeal to the Tennessee Supreme Court. On August 25, 2010, the Supreme Court denied the request but designated the Court of Appeals' opinion "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45).

## REASONS FOR DENYING REVIEW

Petitioner grounds his petition for writ of certiorari on Sup. Ct. R. 10(c), contending that his case presents an opportunity for this Court to directly settle an important question of federal law that it has not yet specifically addressed, and that the Tennessee Court of Appeals' decision conflicts with relevant decisions of this Court. (Pet. 8). Petitioner is incorrect; the petition for writ of certiorari fails to identify any

"compelling reason" within the rubric of Sup. Ct. Rule 10 that would warrant this Court's review.

## I. THE TENNESSEE COURT OF APPEALS' DECISION IMPLICATES NO IMPORTANT QUESTION OF FEDERAL LAW

For several reasons, the Tennessee Court of Appeals' decision implicates no important question of federal law.

First, the Tennessee Court of Appeals' decision was premised not upon federal law or constitutional jurisprudence, but upon its correct determination that, both as a matter of fact and of Tennessee state law, petitioner was not entitled to dismissal of the administrative charges against his medical license in the unique circumstances of his case. Petitioner's claim that the Department of Health reached and breached two enforceable settlement agreements with him was hotly disputed between the parties, and the Court of Appeals reached the quite unremarkable conclusion that, due to this dispute of material fact, the administrative judge correctly denied petitioner's motion to dismiss.

Petitioner produced *no contemporaneously made* evidence of an alleged agreement following negotiations between counsel in 2004 and no affidavit or other sworn testimony supporting the existence of a settlement agreement. The *only* "evidence" presented by petitioner of such an agreement was a letter from his counsel that was sent to Department counsel approximately one (1) year after the negotiations - *i.e.*, on July 28, 2005 – in response to the Department's July 12, 2005, notice that it would

proceed with administrative charges against petitioner. (Adm.R.: Vol. 2: T.R. 120-22, 123-24).[1] Petitioner's counsel at the time has since died, and his letter account of the terms of the alleged settlement agreement differed from the terms that former Department counsel believed would have been under discussion by the two; Department counsel had no memory of the events as asserted in this letter. (Adm.R.: Vol. 2: T.R. 224, 235-238).

Nor was there any settlement agreement with petitioner in 2006. The parties never finalized the terms of an agreement, and no proposed draft agreement was approved by the medical director of the Board of Medical Examiners or by the Board itself, as required by Board regulation, Tenn. Adm. R. & Regs. 0880-02-.11(4). (Adm.R.: Vol. 1: T.R. 29-42; Vol. 2: T.R. 137, 209, 454; Supp.Adm.R.: Vol. 1: T.R. 70). Even assuming *arguendo* that counsel had agreed upon the terms of an agreement, consent was withdrawn by the Department of Health before the agreement was presented to the Board of Medical Examiners for approval. Under Tennessee law, a valid consent judgment cannot be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to entry of the judgment. *Harbour v. Brown*, 732 S.W.2d 598, 599 (Tenn. 1987).

Second, while the Court of Appeals' decision includes a discussion of petitioner's due process claim for dismissal of the charges against his medical license

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[1] Citations to the record are to the appellate record, including the record of the administrative proceedings, from the Tennessee Court of Appeals.

(Pet. App. 42-43), this discussion is clearly *obiter dictum*. The court stated that the due process issue was moot because it had decided the questions before it on other grounds. (Pet. App. 42).

Third, the Court of Appeals' opinion was designated "Not for Citation" by the Tennessee Supreme Court in accordance with Tenn. Sup. Ct. R. 4(E). (Pet. App. 45). As a result, the opinion has no precedential value and may not be published nor cited by any judge in any trial or appellate court decision or by any litigant in any brief unless the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority. Tenn. Sup. Ct. R. 4(E).

All of the above considerations counsel overwhelmingly in favor of this Court's denying discretionary review.

## II. THE COURT OF APPEALS' DISCUSSION, IN *DICTUM*, OF PETITIONER'S DUE PROCESS CLAIMS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

Petitioner's assertions to the contrary notwithstanding, examination of the Tennessee Court of Appeals' brief discussion, in *dictum*, of his due process claims reveals clearly that it does not conflict with decisions of this Court. For example, while petitioner suggests that the Court of Appeals erred by failing to separately analyze an asserted substantive due process interest in his license (Pet. 15, 18-19), this suggestion is inaccurate. The Court of Appeals concluded properly and correctly that petitioner had not provided any authority requiring that his case be dismissed on due process grounds and had, in fact,

received abundant procedural due process. (Pet. App. 43). Moreover, review of petitioner's briefs in the Tennessee Court of Appeals reveals that he never raised substantive due process arguments in that Court. Finally, petitioner misplaces his reliance on this Court's decision in *Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232, 246-47 (1957),[2] in which this Court held that the New Mexico Board of Bar Examiners' refusal of an application to practice law based solely upon the applicant's past membership in the Communist Party, prior arrest record, and use of aliases had no rational connection with his fitness or capacity to practice law and thus constituted a denial of his substantive due process rights. There is no such "assertion of arbitrary power" involved in petitioner's case. *Schware*, 353 U.S. at 246.

Nor does the Court of Appeals' decision conflict with this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), a decision concerning prosecutorial breach of a criminal plea agreement. In *Santobello*, the prior prosecutor in the case had agreed in plea negotiations to make no recommendation as to the sentence, upon the accused's agreement to plead guilty to a lesser charge. The accused entered the agreed-upon guilty plea, and the new prosecutor, apparently not knowing of the agreement, recommended a one-year sentence. The accused was sentenced to one year and took an appeal. This Court determined that the interests of justice and appropriate recognition of the duties of the prosecution

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[2] This is the first instance in which petitioner has cited *Schware* in the many briefs that he has filed in this case.

in relation to promises made in the negotiation of pleas of guilty would be best served by remanding the case to state court for determination of the relief to be accorded the accused. *Santobello*, 404 U.S. at 262-263.

In *Santobello*, however, the state did not contest that the promise had been made by the first prosecutor. Here, of course, the dispute between the parties over the existence of an agreement was *precisely* the basis for the Court of Appeals' decision. Indeed, even as it discussed petitioner's due process argument, the Court emphasized that "whether the claim has been settled at all remains in dispute." (Pet. App. 43).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 10 2011
OFFICE OF THE CLERK

No. 10-725

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**In The**
**SUPREME COURT OF THE UNITED STATES**

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WILLIAM L. HARDY, M.D.,
*Petitioner,*

v.

STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,
*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS*

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# REPLY TO BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF CITED AUTHORITIES ..... ii

REPLY TO BRIEF IN OPPOSITION ..... 1

I. **Both Notice and The Opportunity To Be Heard Must Be *Meaningful* If They Are To Be Consistent with Due Process** ..... 2

II. **The Record is Sufficient for This Court To Rule on the Merits of Petitioner's Claim and To Provide Guidance on Remand About the Protections Afforded to Interests Protected by the Due Process Clause** ..... 5

III. **The Citation Designation of a State Court's Opinion Is Irrelevant If the Opinion Erroneously Decides an Important Federal Question** ..... 7

CONCLUSION ..... 8

## TABLE OF CITED AUTHORITIES

**Cases:**

*Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010) ..... 4

*Matthews v. Eldridge*, 424 U.S. 319 (1976) ..... 2-3

*Santobello v. New York*, 404 U.S. 257 (1971) ..... 6-7

*United States v. Williams*, 504 U.S. 36 (1992) ..... 3-4

**Constitutional and Statutory Provisions:**

U.S. CONST. AMEND. XIV ..... 1, 2, 8

Sup. Ct. R. 10 ..... 8

Sup. Ct. R. 14 ..... 2

Tenn. Sup. Ct. R. 4 ..... 7-8

# IN THE
# SUPREME COURT OF THE UNITED STATES

No. 10-725

WILLIAM L. HARDY, M.D.

*v.*

STATE OF TENNESSEE, DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS*

## REPLY TO BRIEF IN OPPOSITION

Respondent contends that compelling reasons do not exist for this Court to grant review. Respondent's argument fails. This case involves whether State actors in administrative proceedings seeking to restrict a medical license may make and break agreements without recourse. Absent guidance from this Court, lower courts will continue to misconstrue the Fourteenth Amendment's Due Process Clause in the administrative context to provide only the barest procedural protections of notice and hearing. Whether and what recourse exists for this type of constitutional violation was properly raised and passed upon below.

## I. Both Notice and The Opportunity To Be Heard Must Be *Meaningful* If They Are To Be Consistent with Due Process.

The character and scope of the Fourteenth Amendment's Due Process Clause in the administrative context was raised and passed on below. *See* Sup. Ct. R. 14(g)(i). More particularly, in the Petition and at all stages of this case, the issue has been whether State actors may make and break agreements when attempting to revoke a person's liberty and property interest in a medical license. Just providing a holder of a medical license with notice of the attempted deprivation and an opportunity for a hearing on the merits does not resolve the procedural implications of State misconduct in between the notice and any hearing.

The Respondent artificially divides the Petition's core issue into discrete units then asserts that the Petitioner "received abundant procedural due process" and that substantive due process was not raised below. (Brief Opp. 11). This division mischaracterizes the Petition's substance.

First, with respect to procedural due process, the Respondent is correct that the lower court concluded that Petitioner received procedural due process protections, but the Brief in Opposition fails to acknowledge that the lower court perfunctorily concluded so without conducting the analysis required by this Court. *See* (Pet. 10-11) (quoting *Matthews v. Eldridge*, 424 U.S. 319

(1976)). A mechanical recitation of "notice and an opportunity to be heard" as the sole talisman of the Due Process Clause, without establishing the sufficiency of providing bare notice and hearing when there has been State misconduct *in between* the notice and hearing stages, conflicts with relevant decisions of this Court.

Trying to avoid procedural due process altogether, the Respondent also asserts that the Tennessee Court of Appeals' decision was "not [based] upon federal or constitutional jurisprudence." (Brief Opp. 8). In the alternative, Respondent writes that the Tennessee Court of Appeals' decision implicates no important question of federal law because its discussion of due process was *obiter dictum*. (Brief Opp. 9-10). The issue raised in the Petition was arguably determined in *dictum* by the Tennessee Court of Appeals, but it was decided based on an interpretation of the federal constitution. *See* (App. 42) (citing Constitution for proposition that liberty or property interest cannot be taken without due process). Moreover, the Administrative Law Judge, in finding the existence of two prior agreements and a breach on the part of the State, clearly determined the issue as one of due process. (Pet. 4-5); (App. 3-7). The Davidson County Chancery Court also addressed the due process issue. (Pet. 5-6); (App. 20-24). Whether one of the lower courts perhaps decided an issue in *dictum* while the others addressed it in substance, the issue was still "pressed and passed upon below." *Cf. United States*

*v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . .") (internal citations omitted). A review of the entirety of the record shows that petitioner consistently challenged the proceedings as violating due process. *See e.g.*, (Record 500-02) (briefing issue of due process as part of motion to dismiss before the Tennessee Board of Medical Examiners).

Second, and related to the previous point, with respect to substantive due process, even if Respondent is correct that the precise issue was not previously raised, *but see* Appellant's Brief to Tenn. Ct. App. at p. 22, it is fairly contained within the due process issues previously raised and properly before this Court. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 893 (2010) ("All concede that this claim is properly before us. And "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'"). As set forth in the Petition, Petitioner's due process claims have been asserted and properly preserved for review by this Court. *See* (Pet. 5-7) (summarizing portions of the opinions below in which due process was discussed).

## II. The Record is Sufficient for This Court To Rule on the Merits of Petitioner's Claim and To Provide Guidance On Remand About the Protections Afforded to Interests Protected by the Due Process Clause.

The factual record established below is sufficient for this Court to determine the constitutional issue posed in the Petition or the appropriate remedy and analysis upon remand. The Respondent opposes this Court's review by claiming that the issues raised in the Petition are not properly before this Court because whether the State and its agents breached two enforceable agreements was "hotly disputed between the parties . . . ." (Brief Opp. 8). The Respondent may continue to dispute that issue, but the Administrative Law Judge who heard arguments and reviewed "the pleadings, testimony of the witnesses and [made] a full and complete review of the record" (Brief Opp. 2) determined that "the 'uncontroverted proof' showed that the parties reached a settlement agreement resulting in an 'Agreed Order' in May 2006, and had reached another settlement agreement . . . [that] could not be 'reconstituted.'" (Brief Opp. 2-3). The State does not dwell on the aspect of the Administrative Law Judge's finding that the first agreement could not be reconstituted because "[t]he State lost or otherwise misplaced the notes of [the] Deputy General Counsel [] memorializing the terms of the first agreement." (App. 5).

Even assuming *arguendo* that "material issues of disputed fact" exist about the agreements between the parties (Brief Opp. 5) and whether the claim against Petitioner's license had been settled by agreement (Brief Opp. 6), the record is sufficient for the Court to determine whether consent by a State agent to resolve a claim repeatedly asserted and withdrawn against a licensee based on changes in personnel is consistent with the Due Process Clause. *See* (Brief Opp. 9) ("consent withdrawn").

Even if the Court declines to reach the factual issue of the existence of agreement and breach, it can still establish the proper analytical framework under the Due Process Clause and remand the case for further factual determinations and resolution under that standard consistent with *Santobello v. New York*, 404 U.S. 257 (1971). The issue under a *Santobello*-type analysis is what law should be applied in determining whether there has been an agreement and whether there has been a breach. In *Santobello*, this Court determined that safeguards are required by the Constitution for a plea of guilty to be fairly entered. *Id.* at 262. The Court then remanded the case for the lower court to apply the announced standard. *Id.* at 262-63 ("[W]e conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of

the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.").

The Petition asks this Court to similarly determine whether due process principles beyond mechanical notice and hearing apply in administrative actions that affect liberty and property interests protected by the federal constitution, and respectfully submits that the record established below is sufficient for this determination.

## III. The Citation Designation of a State Court's Opinion Is Irrelevant If the Opinion Erroneously Decides an Important Federal Question.

The infringement of a constitutional right by State agents is not removed from this Court's purview because an opinion has been marked "Not for Publication" pursuant to a state court rule. *Contra* (Brief Opp. 10). First, the exceptions to Tennessee Supreme Court Rule 4 preventing citation to an opinion so designated swallow the rule. *See* Tenn. Sup. Ct. R. 4(E)(2) (providing that an opinion designated "Not for Publication" should

not be cited "except when the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant"). More importantly, whether an opinion can be cited and the amount of persuasion assigned to it by a state court rule is not a relevant consideration under this Court's considerations governing review on certiorari. *See* Sup. Ct. R. 10 (describing listed reasons as "neither controlling nor fully measuring the Court's discretion"). The proper issue is whether, as set forth in the Petition, the lower court's opinion is inconsistent with this Court's precedent.

The Petition outlines why it is inconsistent with the Fourteenth Amendment's Due Process Clause for State actors to make and break agreements during administrative proceedings seeking to restrict a medical license, and asks this Court either to provide guidance about the proper recourse for such violations or to establish a standard by which lower courts can analyze the alleged deprivation of this liberty and property interest consistent with Due Process safeguards.

## CONCLUSION

For the above reasons and those articled in his Petition, Dr. Hardy respectfully prays that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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February 10, 2011